LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
DEC 20 1969
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1969

No. 976

SAUL SHAPIRO,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

LUKE McKISSACK
Attorney at Law
6430 Sunset Boulevard
Suite 521
Hollywood, California 90028

Telephone: (213) 466-7331

Attorney for Petitioner

SUBJECT INDEX

	Page
Opinion Below.....	2
Grounds on which the jurisdiction of this Court is invoked.....	2
Questions presented for Review.....	3
Constitutional Provisions Involved.	4
Statement of the Case.....	4
Statement of Facts.....	5
Reasons for Granting the Writ.....	11
I	
Evidence was illegally seized from Petitioner without probable cause for an arrest and without a basis for stopping and frisking Petitioner, and was a direct result of overbearing and harassing action by the police, contrary to the guarantees of the Fourth and Fourteenth Amendments to the United States Constitution. The arrest and prosecution based on said illegal seizure are null and void.....	12
II	
The uncontradicted record establishes that Petitioner committed no crime. The conviction based on this evidence is contrary to guarantees of due process of law contained in the Fourteenth Amendment to the United States Constitution.....	28

SUBJECT INDEX

	Page
Conclusion.....	36

INDEX TO APPENDIX

Appendix "A":

United States Constitution, Amendment IV.....	1
United States Constitution, Amendment XIV.....	1
California Penal Code, Section 12031	2

TABLE OF AUTHORITIES

	Page
Badillo v. Superior Court (1956) 46 Cal. 2d 269 294 P2d 23	22,24,26
Bailey v. Toaffe 29 Cal. 423	31
Gascon v. Superior Court, County of Los Angeles (1959) 169 Cal. App. 2d 356 337 P2d 201	24
People v. Garrett (1965) 237 Cal. App. 2d 701 47 Cal. Rptr. 194	27
People v. Gibson (1963) 220 Cal. App. 2d 15 33 Cal. Rptr. 775	14
Gossman v. Gossman (1942) 52 Cal. App. 2d 184 126 P2d 178	32,33,35
In re Harris (1961) 56 Cal. 2d 879 16 Cal. Rptr. 889	33, 34
People v. Henze (1967) 253 Cal. App. 2d 986 61 Cal. Rptr. 545	15, 20
People v. Macias (1960) 180 Cal. App. 2d 193 4 Cal. Rptr. 256	27
People v. Mickelson (1963) 59 Cal. 2d 448 30 Cal. Rptr. 18	20,21
People v. Moray 222 Cal. App. 2d 743 35 Cal. Rptr. 432	16, 20

TABLE OF AUTHORITIES

	Page
People v. Russel (1968) 69 A.C. 189 70 Cal. Rptr. 210	30, 33
People v. Stewart (1966) 241 Cal. App. 2d 509 50 Cal. Rptr. 630	27
Sibron v. New York (1968) 392 U.S. 40 88 S. Ct. 1889	18
Terry v. Ohio (1968) 392 U.S. 1 88 S. Ct. 1868	17

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1969

No. _____

SAUL SHAPIRO,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE DEPARTMENT OF THE SUPERIOR COURT OF THE COUNTY OF LOS ANGELES, STATE OF CALIFORNIA

Petitioner, SAUL SHAPIRO, respectfully prays for a Writ of Certiorari to the Appellate Department of the Superior Court for the County of Los Angeles, State of California, to review its judgment affirming Petitioner's conviction and the imposition

of a fine of Two Hundred Fifty ($250.00) Dollars in the Municipal Court of the Long Beach Judicial District, County of Los Angeles, California.

OPINION BELOW

Trial in the Municipal Court was by the Court sitting without a jury. The Appellate Department of the Superior Court of the County of Los Angeles affirmed the conviction without opinion.

GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The highest court of this State with jurisdiction to review the judgment of conviction herein is the Appellate Department of the Superior Court for the County of Los Angeles, State of California. The order of the Appellate Department affirming the judgment of the Municipal Court was made on September 10, 1969. The order of the Appellate Department denying Petitioner's Petition for Rehearing and/or Certification to the

Court of Appeals for the State of California was made on September 23, 1969.

The statutory provision believed to confer on this court jurisdiction to review the judgment in question by Writ of Certiorari is 28 U.S.C. Section 1257 (3).

QUESTIONS PRESENTED FOR REVIEW

I

Was Petitioner's conviction based upon evidence seized from Petitioner in an illegal search and seizure, without a probable cause for arrest or detention and "frisk", and as a direct result of overbearing and harassing actions by the police, contrary to the guarantees of the Fourth and Fourteenth Amendments to the United States Constitution?

II

Did Petitioner's conviction based upon evidence which was insufficient as a matter of law to sustain the conviction, deprive Petitioner of due process of law guaranteed by the Fourteenth Amendment to the United

States Constitution?

CONSTITUTIONAL PROVISIONS INVOLVED

Involved are the United States Constitution, Amendments IV and XIV.

STATEMENT OF THE CASE

Saul Shapiro, Petitioner herein, was arrested on November 27, 1968. On November 29, 1968, a complaint was issued charging him with a violation of Penal Code Section 21031, carrying a loaded firearm in an automobile.

On February 20, 1969, defendant's motion to suppress the evidence under Penal Code Section 1538.5 was heard and denied. On that same date Petitioner was tried by the Honorable Kenneth E. Sutherland, a Judge of the Municipal Court of the Long Beach Judicial District, sitting without a jury. Petitioner was found guilty and a probation and sentence hearing was set for March 13, 1969. A fine of Two Hundred Fifty ($250.00) Dollars, payable through the Probation Depart-

ment was levied.

Petitioner duly filed a Notice of Appeal.

STATEMENT OF FACTS

Officer D. L. Brown testified for the People as follows:

We were dispatched to 2677 East 56th Way, in regard to a possible burglary and possible ex-husband breaking in and armed. When officers arrived at the scene, they observed Defendant Shapiro walking eastbound from the apartment complex past the officer's car to Shapiro's car. Shapiro entered his automobile and seated himself behind the steering wheel. Brown at this time asked for identification which was produced. Shapiro was then asked if he had any weapons on his person and said no. Officer Brown then asked Shapiro to step from the car so that he could be searched. At that point Officer Brown observed him to slide his right hand under his suit-coat and reach toward the left side of his waistband. Suspect continued in his attempt to remove the gun from his

waistband. Officer Brown, with the assistance of Officer Thomas, overpowered the defendant. Officer Brown inspected the weapon and observed that there were five (5) live rounds in the clip of the belt.

The Prosecution rested.

The Petitioner testified in his own defense:

He and his wife Linda, who had been married for slightly over two years, resided at 2677 East 56th Way in Long Beach and had done so for approximately one and one-half years. Due to some marital disagreement the Petitioner took up temporary residence elsewhere while maintaining the preponderant majority of his belongings at the 56th Way address; he also continued to receive mail there. Prior to the date of arrest, November 27, 1968, he and his wife discussed reconciliation. Indeed, they had made plans to join his wife's relatives for Thanksgiving Dinner and, in fact, had made plans to spend the holiday at a cabin in the desert. Shapiro,

in preparation for this holiday retreat, loaded his automobile with, among other things, an ice chest, a 22 calibre rifle and a 25 calibre automatic. It was his practice to target shoot while staying at this cabin. After the aforesaid understanding by the spouses had been achieved, he went shopping. In Zody's advertising Shapiro noted some women's apparel in which he thought his wife previously had expressed an interest. Thereupon he returned to the house wherein his wife was residing to ask her how many of the particular items mentioned above she desired. He arrived at the domicile shortly after 10:00 P.M. and knocked at the door. The kitchen light was on at the time Shapiro knocked at the door and received no answer. His wife's car was parked in front of the residence. It was the normal practice of both Shapiro and his wife to leave the kitchen light on when they were out. He surmised that his wife was visiting across the street where her closest girl friend lived.

While ringing the doorbell, Shapiro saw a shadow inside the house and, due to the fact that on prior occasions his wife had awakened him with "burglar scares", he thought a burglar might have been in the house. Thus, he returned to the trunk of his car and removed the 25 calibre pistol. As he returned to the house the kitchen light went out. At this juncture he, while undoubtedly keyed up, was fearful of what was transpiring within the residence. Shapiro intermittently rang the doorbell but received no answer. He then left the premises for his automobile when a police car drove up. A police officer shined the light in his face and queried, "Do you live here, Sir?". Shapiro responded that he did and identified himself. The officer apologized for his inconvenience and Shapiro climbed into his automobile.

As Shapiro was preparing to leave, the driver of the now parked police car asked him, "Do you have any firearms?" Shapiro

answered, "No". The officer insisted on looking to ascertain whether in fact Shapiro was armed. Pursuant to the officers design, he steadfastly insisted that Shapiro step out of the car. Shapiro at that moment realized that the pistol would be visible to the officer after he exited from the car and attempted to discard the pistol prior to that exit. The officer, however, removed the weapon and placed him under arrest.

Petitioner's wife, Linda Shapiro, was called as a witness for the defense and testified:

That she was the wife of the Petitioner; that she and Petitioner had been married for slightly over two years, resided at 2677 East 56th Way in Long Beach and had done so for approximately one and one-half years. Due to a marital disagreement her husband had taken temporary residence elsewhere while maintaining the preponderant majority of his belongings at the 56th Way address. Prior to the date of arrest, November 27, 1968, she and her

husband had discussed reconciliation. They had also made Thanksgiving Dinner plans and had further planned to spend the holiday at a cabin in the desert; that Defendant routinely did target shooting when staying at the desert cabin. She further testified that shortly after 10:00 P.M. while bathing she heard a knock at the door and later saw Shapiro with what might have been a pistol at the door, turned off the light, and called the police.

On rebuttal, Linda Shapiro testified for the prosecution that she called the police because she was afraid.

Officer M. Kinrade testified that Linda Shapiro told him that she and the suspect had filed for divorce and that the suspect had repeatedly threatened her life and her child. Officer Kinrade further testified that Linda Shapiro told him that the Defendant had been pounding on her door for an hour and a half and that she felt he might have a gun. She further stated that Defendant told her

if she ever called the police, he would kill her.

The court found Petitioner guilty based on the fact that he had not presented a believable defense to the charge.

REASONS FOR GRANTING THE WRIT

This is a case in which the evidence - a loaded fire arm was seized from Petitioner prior to arrest. After the evidence was discovered Petitioner was arrested, prosecuted and convicted of a Violation of Penal Code Section 12031, carrying a loaded firearm in an automobile. Carrying a loaded firearm in an automobile is a violation of the law only if the carrying of the firearm does not come within one of the exceptions set forth in Penal Code Section 12031. Petitioner contends that the seizure of the loaded gun was made without probable cause and the gun should not have been admitted into evidence. Petitioner further contends that the uncontradicted record establishes that he was carrying a firearm within some of the exceptions

provided by Penal Code Section 12031 and that his conviction is therefor as a matter of law, unsupported by any evidence. These two questions will be discussed below.

I

EVIDENCE WAS ILLEGALLY SEIZED FROM PETITIONER WITHOUT PROBABLE CAUSE FOR AN ARREST AND WITHOUT A BASIS FOR STOPPING AND FRISKING PETITIONER, AND WAS A DIRECT RESULT OF OVER-BEARING AND HARASSING ACTION BY THE POLICE, CONTRARY TO THE GUARANTEES OF THE FOURTH AND FOURTEENTH AMEND-MENTS TO THE UNITED STATES CONSTITU-TION. THE ARREST AND PROSECUTION BASED ON SAID ILLEGAL SEIZURE ARE NULL AND VOID.

The facts leading to the seizure of Petitioner's firearm are simple. The police went to an apartment complex located at 2677 East 56th Way, Long Beach, to investigate "a possible burglary and a possible ex-

husband breaking in and armed". [1] [S. 2/12]. On arriving they observed Petitioner seat himself behind the wheel of an automobile. Officer Brown asked for identification which Petitioner gave him. He asked Petitioner whether he had any firearms and Petitioner replied "No". At this point, prior to arresting Petitioner, Officer Brown demanded that he be permitted to search Petitioner. The officer had no basis for arresting Petitioner, and no reason for searching him. As a consequence of the officers illegal demand, Petitioner's gun was seized and Petitioner arrested. The seizure, followed by Petitioner's arrest was illegal.

The legality of the seizure in this case depends on whether the police had probable cause to arrest Petitioner before evidence of the loaded gun was uncovered.

1/ "S" refers to the Engrossed Settled Statement on appeal. The first number is the page thereof, followed by a slash bar and the line.

"If, before a search is made, the circumstances are such as to justify the officer in making an arrest, it is immaterial whether the search precedes or follows the arrest. (See Willson v. Superior Court (1956), 46 Cal. 2d 291, 294, 294 P2d 36, and cases there cited) So here, it is immaterial as to whether defendant was arrested the moment he entered the police car or later. The crucial question is, at the moment the officers started to search the car did they have probable cause for making an arrest of defendant? The determination of this question must be based upon the knowledge that the officers then had. What they discovered in the search cannot be considered. (See People v. Mickelson, supra, 59 A.C. 465, 471, 30 Cal. Rptr. 18, 380 P2d 658; People v. Brown (1955) 45 Cal. 2d 640, 643-644, 290 P2d 538)" People v. Gibson, 220 Cal. App. 2d 15, 33 Cal. Rptr. 775

(1963) (Emphasis added).

Examining the evidence it is apparent, in the first instance there was no basis for detaining Petititioner. By the testimony of the police, themselves, Petitioner merely walked from the apartment house complex to his car, and seated himself behind the driver's wheel. People v. Henze, 253 Cal. App. 2d 986, 61 Cal. Rptr. 545 (1967), defines the circumstances for a lawful detention:

> "First, there must be a rational suspicion by the peace officer that some activity out of the ordinary is or has taken place. Next, some indication to connect the person under suspicion with the usual activity. Finally, some suggestion that the activity is related to crime." (61 Cal. Rptr. at 547).

In the instant case the police did not have a rational suspicion that some unusual

activity had taken place. They were in the apartment complex because of a report of possible unusual as well as criminal activity. There was, according to the record, nothing "to connect [Petitioner] with the unusual activity. Certainly, the mere fact that a person walks from an apartment complex to his car is not sufficient reason for the police to stop him. If it is, every individual who has the audacity to approach his parked car (at a reasonable hour in the evening) may be subjected to police interrogation simply because someplace in the neighborhood someone has summoned them to find out if there possibly has been a crime committed. And everyone may be subject to detention regardless of any apparent connection with criminal activity. It is submitted that "such is fortunately not the law". People v. Moray, 222 Cal. App. 2d 743, 35 Cal. Rptr. 432, 434. The evidence which was seized was the product of the unlawful detention, and consequently was inadmissible in evidence.

Assuming, arguendo, that Petitioner's detention was lawful, there was no basis for ordering him to submit to a search. This Court recently enunciated the rules for a constitutionally permissible search during a detention. The first requirement is the presence of conduct which leads a police officer reasonably to conclude that, in the light of his experience, there may be criminal activity afoot. Next, the officer must reasonably believe that the person with whom he is dealing is armed and presently dangerous. And finally, if his detention of the suspect and his reasonable inquiries do nothing to dispel his initial fear, the officer may conduct a narrowly defined, limited search. Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868 (1968).

In the case at bar, the police did not have a basis for the reasonable belief that Petitioner was armed and presently dangerous. As has been pointed out, Petitioner was doing nothing unusual or suspect. The

police had not observed anything to make them think he was armed. At most, they had a report from his wife that she felt Petitioner might have a gun. The interrogation which the police conducted while Petitioner was detained entirely comported with innocence. It cannot be considered "nothing" to dispel the officers' fear. On the contrary, Petitioner did everything possible to allay the officers' fears. The warning in Sibron v. New York, 392 U.S. 40, 88 S. Ct. 1889 (1968) is applicable here:

> "The police officer is not entitled to seize and search every person whom he sees on the street or of whom he makes inquiries. Before he places a hand on the person of a citizen in search of anything, he must have constitutionally adequate, reasonable grounds for doing so. In the case of the self-protective search for weapons, he must be able to point to particular facts from which he reasonably inferred that the individual

was armed and dangerous." (88 S. Ct. at 1903) (Emphasis added).

The police here had not the slightest grounds for the illegal search of Petitioner. There ephemeral suspicions are not the "constitutionally adequate" grounds the Fourth Amendment requires.

Irrespective of the propriety of the detention the seizure of the evidence was without probable cause for an arrest. The record shows that there was no evidence that Petitioner had probably committed a felony. The only evidence that the police had was that of a possible burglary or a possible ex-husband breaking in and armed. The record does not show that in fact there had been a burglary which they were going to investigate, or that an ex-husband had broken in and threatened with guns or done anything of that sort. There is no evidence that the police had a reasonable basis for believing a felony had been committed. Such a reasonable belief is an essential part of probable cause. At the

time they stopped Petitioner the police had nothing more than a basis for an investigation to ascertain whether a crime had been committed. This alone does not provide a basis for an arrest. People v. Moray, supra; People v. Henze, supra.

Before discovering the gun, the officers did not have the faintest suspicion that Petitioner had probably committed the non-existent felony. The officers saw Petitioner doing absolutely nothing more than getting into his car at perhaps 11:00 o'clock at night. They approached him and asked him for identification. He immediately cooperated and identified himself. These are the actions of a completely innocent person and provide no foundation for an arrest. The leading California Case of People v. Mickelson, 59 Cal. 2d 448, 30 Cal. Rptr. 18 (1963), plainly establishes that even far more than this is insufficient to give probable cause for an arrest. In Mickelson police officers had factual information concerning an actual

robbery of a market. They had a description of the robber, a description which fit the defendant. They discovered the defendant a short time after the robbery in the general vicinity, driving under what they considered to be suspicious circumstances. However when they stopped to investigate, the defendant was completely cooperative identifying himself and explaining his presence in the neighborhood in a manner which comported with innocence. The Court held that while the police were within their authority to stop the defendant and interrogate him with regard to the robbery they did not have probable cause for his arrest.

In the case before this Court there is not even as much evidence as there was in Mickelson. Here there was no reported felony; there was no "suspicious" circumstances, only a possible crime whose very existence had not yet been ascertained. Petitioner was completely cooperative with the police when he was discovered doing the entirely innocent act of getting into his

car and sitting behind the driver's wheel.

Because there was no probable cause for Petitioner's arrest, the police had no authority to demand that he submit to a search. Despite the fact that the police had no reason whatever for searching Petitioner, Officer Brown insisted that Petitioner step from his car so that he could be searched. [S. 2/22; 4/24-28]. In response to the police demand, Petitioner attempted to discard his gun [S. 4/30]. The police then seized the gun from him [S. 2/29; 4/32]. It is submitted that the discovery of the gun, and its seizure from Petitioner was a direct result of the illegal demand of the police that Petitioner permit a search.

The case of Badillo v. Superior Court, 46 Cal. 2d 269, 294 P2d 23 (1956) is instructive. In Badillo narcotic agents and the police officers went to the Petitioner's home. They knocked at the back door, which was locked, and received no response. Officers forced the door open and entered the

house. Shortly thereafter Petitioner, followed by one of the police officers, went out the front door and threw a package of heroin toward a narcotic agent, who recovered it. The heroin formed the basis for a prosecution against Petitioner. The officers did not have a search warrant and did not testify that the entry into Petitioner's home was pursuant to probable cause for an arrest. Accordingly, the California Supreme Court concluded that the entry into the house was unlawful. The people argued that when Petitioner threw the heroin away he had abandoned it and therefore could not object to its use against him. The California Supreme Court said:

> "it clearly appears ...that defendant's flight out the front door and attempted disposal of the evidence was the direct result of Officer Getchell's illegal entry, and accordingly, the evidence was obtained in violation of constitutional guarantees." (294 P2d at 25)

(Emphasis added).

Badillo established for California, the constitutional principle that evidence which is revealed by its possessor as a direct result of the illegal activity of the police, is evidence obtained in violation of the Fourth Amendment. The principle first enunciated in Badillo was applied in Gascon v. Superior Court, County of Los Angeles, 169 Cal. App. 2d 356, 337 P2d 201 (1959) on facts quite similar to those before the court herein. In Gascon police approached a parked car and questioned its occupant who stated that her boyfriend had gone to the liquor store to purchase some cigarettes. Petitioner approached the parked car and the police intercepted him. They questioned him and ascertained that he had been to the liquor store to purchase some cigarettes; what his name was; and that he had been arrested before. He appeared nervous while being questioned. After questioning, the officers told Petitioner they were

going to search him, whereupon he attempted to flee. He was overtaken from 25 to 35 feet away but by then he had managed to throw some objects away. In one of the discarded packages the police found marijuana. The court held that the marijuana had been obtained as the result of illegal police procedure, saying:

"If probable cause had existed for the petitioner's arrest it would be of no moment that they attempted a search of defendant's person before making the arrest rather than afterward. People v. Simon, supra. There being no probable cause for arrest, if the officers had carried out their threat to search petitioner's person and had found the contraband in the process of the search, there would be no question but that the evidence was illegally obtained and, therefore, inadmissible. People v. Harvey, supra; People v. Simon, supra; People v. Brown,

supra.

In the present case petitioner's flight was caused by the threat of the officers to illegally search his person which they could, without question, have put into effect, and the discarding by the petitioner of the evidence upon his person was but a product of the threat. We cannot distinguish this case in principle from that of Badillo v. Superior Court, 46 Cal. 2d 269, 294 P2d 23. ****.

In the cited case as well as in the case at bar, the petitioner was fleeing from the attempted illegal invasion of his constitutional rights (Fourth Amendment, U. S. Const.; Cal. Const. Art. I, Sec. 19), and in each case, during the flight, he attempted to dispose of the evidence which the officers would have obtained had they been able to complete the threatened unlawful act. In each case the evidence, being the product of the illegal acts of the officers, was illegally obtained." (337 P2d at 202).

See also People v. Stewart, 241 Cal. App. 2d 509, 50 Cal. Rptr. 630 (1966); People v. Garrett, 237 Cal. App. 2d 701, 47 Cal. Rptr. 194 (1965); People v. Macias, 180 Cal. App. 2d 193, 4 Cal. Rptr. 256 (1960).

In the case at bar the police demanded, unjustifiably that Petitioner submit himself to a search. As a result of this overbearing and overreaching order, Petitioner revealed a firearm which the police seized. This seized evidence, illegally obtained as a result of the overbearing action of the police, became the basis for Petitioner's arrest, prosecution and conviction. As in the cases cited above, it is submitted that the evidence, being the product of the illegal acts of the officers, was illegally obtained, inadmissible in evidence, and rendered the conviction null and void.

II

THE UNCONTRADICTED RECORD ESTABLISHES THAT PETITIONER COMMITTED NO CRIME.

THE CONVICTION BASED ON THIS EVIDENCE IS CONTRARY TO GUARANTEES OF DUE PROCESS OF LAW CONTAINED IN THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

The uncontradicted record in this case is that Petitioner and his wife had planned to spend the Thanksgiving holiday at a cabin in the desert. Petitioner routinely did target shooting while staying at this cabin. In preparation for the holiday he had loaded his automobile with, among other things, an ice chest, a 22 calibre rifle and a 25 calibre automatic. [S. 3/18-20; 5/15-17] Petitioner took his gun out of the car because he feared for his wife's safety. [S. 4/5-13]. The uncontradicted evidence brought Petitioner within the exceptions to Penal Code Section 12031, which provide:

"(a) Except as provided in subdivision (b), every person who carries a loaded firearm on his person or in a vehicle,

while in any public place or on any public street, in an incorporated city or in any public place or on any public street in a prohibited area of unincorporated territory is guilty of a misdemeanor.

(b) Subdivision (a) shall not apply to any of the following: **** (4) Persons who are using target ranges for the purpose of practice shooting with a firearm, or who are members of shooting clubs while hunting on the premises of such clubs. ****

(h) Nothing in this section is intended to preclude the carrying of any loaded firearm, under circumstances where it would otherwise be lawful, by a person who reasonably believes that the person or property of himself or another is in immediate danger and that the carrying of such weapon is necessary for the preservation of such person or property."

The trial judge entirely disregarded the uncontradicted record, and found that Petitioner had not presented a defense to the charge of violating Section 12031 of the Penal Code. It is submitted that the court abused its discretion when it disregarded the entirely uncontradicted record.

The discretion of the court to disregard evidence is not an unbridled discretion. The concept of judicial discretion means more than wholly arbitrary decision making power.

> "We have explicated the concept of judicial discretion on innumerable occasions and in a variety of factual contexts. Obviously the term is a broad and elastic one (See 27 C.J.S. p. 292) which we have equated with "the sound judgment of the court, to be exercised according to the rules of law" (Lent v. Tillson (1887) 72 Cal. 404, 422; 14 P. 71, 78)." People v. Russel, 69 A.C, 189, 70 Cal. Rptr. 210, 215(1968).

While it has been said that the only

restraint upon the exercise of discretion is that it not be abused, it is plain that "abuse" has a legal meaning.

> "[W]e have said: "'In a legal sense discretion is abused whenever in the exercise of its discretion the court exceeds the bounds of reason, all of the circumstances before it being considered.'" (State Farm, etc., Ins. Co. v. Superior Court (1956) 47 Cal. 2d 428, 432, 304 P2d 13, 15, quoting Berry v. Chaplin (1946) 74 Cal. App. 2d 669, 672, 169 P2d 453)." Ibid.

Historically, the exercise of judicial discretion has not been unfettered. In the early case of Bailey v. Toaffe, 29 Cal. 423, at p. 424 the California Supreme Court delineated the limits of judicial discretion as follows:

> "The discretion intended, however, is not a capricious or arbitrary discretion, but an impartial discretion, guided and controlled in its exercise by fixed legal principles. It is not a mental

discretion to be exercised ex gratia, but a legal discretion, to be exercised in conformity with the spirit of the law, and in a manner to subserve and not to impede or defeat the ends of substantial justice."

More recently the court has described the bounds of judicial discretion in a manner similar to the definition given in the Bailey case.

"'The word imports the exercise of discriminating judgment within the bounds of reason. Discretion in this connection means a sound judicial discretion, enlightened by intelligence and learning, controlled by sound principles of law, of firm courage combined with the calmness of a cool mind, free from partiality, not swayed by sympathy nor warped by prejudice nor moved by any kind of influence save alone the overwhelming passion to do that which is just.'" Gossman v.

Gossman, 52 Cal. App. 2d 184, 195, 126 P2d 178, 184 (1942).

From the definitions of judicial discretion it appears that it is properly exercised only by a judicious application of law to facts reasonably considered. There is no room in the exercise of sound judicial discretion arbitrary or capricious disregard of evidence. In the Russel case the trial court was castigated for abusing its discretion to receive evidence when the court rejected an offer of relevant evidence. In the case of In re Harris, 56 Cal. 2d 879, 16 Cal. Rptr. 889 (1961) Petitioner was arrested for allegedly selling obscene material. At the trial he offered evidence that the material petitioner sold was within contemporary standards, and therefor not obscene. The trial court refused to admit the evidence. On a Writ of Habeas Corpus the California Supreme Court held that it was a violation of due process to reject the evidence.

In the instant case, the trial court

received evidence that Petitioner was going target shooting, and routinely did so. The court also received evidence that Petitioner was carrying his gun because he feared for the safety of his wife. The court thus heard testimony which brought Petitioner within the protection of Penal Code Section 12031 (b) (4) and (h). The evidence was uncontradicted; yet it was rejected. No reason appears. The record contains no evidence of illegality other than the possession of the loaded gun. No evidence that Petitioner was not within the Penal Code exception is in the record. In rejecting the testimony of both Petitioner and his wife the court did not choose to believe the testimony of one witness rather than another who testified to different facts. The court totally rejected the only evidence relevant to the exception. In this sense it was no different than if the court had refused entirely to hear evidence that Petitioner came within subdivisions (b) (4) and (h). Cf. In re Harris, supra. The trial court decided this case solely on the basis

of evidence of possession of a loaded fire-arm. But that is not the crime encompassed by the law. It is unexcused possession of a loaded gun which comprises the violation. The court cannot reject evidence of excused possession unless there is a basis in the record for deciding that the possession is contrary to law. To conclude that Petitioner had not presented a believable excuse based on uncontradicted evidence of an excuse, made a nullity of subdivisions (b) (4) and (h) was an arbitrary and capricious abuse of judicial discretion, and deprives Petitioner of due process of law.

> "Certainly a decision rendered in disregard of fundamental facts upon which the parties were relying or based on facts not adduced at the trial and unregulated by those principles which are recognized as being inherent in the true concept of judicial discretion would not be a judicial decision in the true sense." Gossman v. Gossman, supra, 126 P2d at 184-85.

CONCLUSION

For the foregoing reasons the within Petition for Writ of Certiorari should be granted.

Respectfully submitted,

LUKE McKISSACK
Attorney for Petitioner

APPENDIX A

UNITED STATES CONSTITUTION

AMENDMENT IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

UNITED STATES CONSTITUTION

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without

due process of law; nor deny to any person, within its jurisdiction the equal protection of the laws.

CALIFORNIA PENAL CODE
SECTION 12031

(a) Except as provided in subdivision (b), every person who carries a loaded firearm on his person or in a vehicle while in any public place or on any public street in an incorporated city or in any public place or on any public street in a prohibited area of unincorporated territory is guilty of a misdemeanor.

(b) Subdivision (a) shall not apply to any of the following:

(b) (4) Persons who are using target ranges for the purpose of practice shooting with a firearm, or who are members of shooting clubs while hunting on the premises of such clubs.

(h) Nothing in this section is intended to preclude the carrying of any loaded

firearm, under circumstances where it would otherwise be lawful, by a person who reasonably believes that the person or property of himself or another is in immediate danger and that the carrying of such a weapon is necessary for the preservation of such person or property.

STATE OF CALIFORNIA)
) ss
COUNTY OF LOS ANGELES)

I am a citizen of the United States and a resident of the County aforesaid; I am over the age of eighteen years and not a party to the within entitled action; my business address is 6430 Sunset Boulevard, Suite 521, Hollywood, California 90028. On December 18, 1969, I served the within Petition for Writ of Certiorari on the plaintiff and respondent in said action, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Attorney General
217 West 1st Street
Los Angeles, California

~~District Attorney~~ City Prosecutor
~~415 West Ocean Boulevard~~ 107 Public Safety Bldg.
Long Beach, California

Clerk, Superior Court, Appellate Dept
~~415 West Ocean Boulevard~~ 111 N. Hill St.
~~Long Beach,~~ California
Los Angeles

Clerk, Court of Appeal
217 West First Street
Los Angeles, California

I declare that the foregoing is true and correct.

Executed on December 18, 1969, at Los Angeles, California.

Geraldine Cornwell
Geraldine Cornwell